

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii Citizen,

Plaintiff,

**SECOND  
AMENDED JUDGMENT  
IN A CIVIL CASE**

CIVIL 03-00385SOM-LEK

V.

FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

HAWAIIAN EXPRESS SERVICE, INC.;  
FLEMING COMPANIES, INC., et al.,

March 16, 2006

At 4 o'clock and 00 min p.m.  
SUE BEITIA, CLERK

Defendants.

A Stipulation Regarding Good Faith Settlement between Plaintiff Wayne Berry and Defendants Hawaiian Express Service, Inc., H.E.S. Transportation Services, Inc., California Pacific Consolidators, Inc., Jeffery P. Graham, Peter Schaul, and Patrick Hirayama, (collectively "HEX Defendants") having been approved and ordered and filed on July 7, 2005, and a "Stipulation for Dismissal of the HEX Defendants with Prejudice and Order" having been approved and ordered and filed on July 25, 2005, and this Action having come for hearing before the Court whereby the issues have been heard and decisions have been rendered; and this Action having come for a trial by jury before the Court whereby the issues have been tried and decision has been entered; the Clerk of Court enters an AMENDED JUDGMENT as follows:

IT IS ORDERED AND ADJUDGED that pursuant to the "ORDER GRANTING DEFENDANT FOODLAND'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT HAWAII TRANSFER COMPANY'S MOTION FOR SUMMARY JUDGMENT; AND GRANTING IN PART, DENYING IN PART DEFENDANTS DILLON, NOA, AND CHRISTENSEN'S MOTION FOR SUMMARY JUDGMENT" filed on January 26, 2005:

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- SUMMARY JUDGMENT as to Counts I, II, III, and VI of the Second Amended Verified Complaint is GRANTED in favor of defendant Foodland Super Market, Limited; in favor of defendant Hawaii Transfer Company, Limited, and against plaintiff Wayne Berry. As to Count 5 of the Second Amended Verified Complaint, the Court dismisses all claims under the Sherman Act against defendant Foodland Super Market, Limited and against defendant Hawaii Transfer Company, Limited, pursuant to FRCP Rule 12(b)(6); and,
- SUMMARY JUDGMENT with respect to Defendants Mark Dillon, Brian Christiansen, and Teresa Noa [collectively, "Employee Defendants"] is DENIED in Part and GRANTED in Part, as pursuant to the aforementioned January 26, 2005 Order, wherein "*...The Court denies summary judgment to [defendant Mark] Dillon and [defendant Teresa] Noa with respect to Count I for acts occurring between the dates of March 7, 2003, and June 9, 2003, but grants summary judgment to [defendant Brian] Christiansen with respect to Count I for that time period. The court grants summary judgment to all Employee Defendants with respect to Count I for acts occurring outside the period from March 7, 2003, to June 9, 2003. The court grants summary judgment to Employee defendants on Counts II, III, and IV, and dismisses Count V with respect to Employee Defendants...*".

IT IS FURTHER ORDERED that SUMMARY JUDGMENT IS GRANTED in favor of defendant AlixPartners and against plaintiff Wayne Berry, and is granted as pursuant to the "ORDER DENYING BERRY'S MOTION FOR SUMMARY JUDGMENT AGAINST ALIXPARTNERS; ORDER GRANTING ALIXPARTNERS' COUNTERMOTION FOR SUMMARY JUDGMENT" filed on June 17, 2005.

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IT IS FURTHER ORDERED that: (1) Plaintiff Wayne Berry's Motion for Summary Judgment is Granted in Part and Denied in Part ; (2) Defendant Post Confirmation Trust-- *as the representative of defendant Fleming Companies, Inc. during Fleming Companies, Inc.'s bankruptcy*--Counter-Motion for Summary Judgment is Granted in Part and Denied in Part ; (3) Defendants C&S Logistics of Hawaii, LLC, C&S Wholesale Grocers, Inc.; C&S Acquisitions, LLC, ES3, LLC, and Richard Cohen's Counter-Motion for Summary Judgment are GRANTED; (4) Defendants Mark Dillon, Teresa Noa, Melvin Ponce, Sonia Purdy, Justin Fukumoto, Alfreda Waiolama, and Jacqueline Rio's Counter-Motion for Summary Judgment is GRANTED in Part and DENIED in Part; and (5) Defendants Guidance Software, Inc., and Michael Gurzi's Counter-Motion for Summary Judgment is GRANTED.<sup>1</sup>

Said Motions are adjudicated as pursuant to the "ORDER GRANTING IN PART, DENYING IN PART BERRY'S MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING C&S LOGISTICS OF HAWAII, LLC, C&S WHOLESALE GROCERS, INC., C&S ACQUISITION, LLC, ES3, LLC, AND RICHARD COHEN'S MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING GUIDANCE SOFTWARE, INC., AND MICHAEL GURZI'S MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING IN PART, DENYING IN PART REMAINING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT" filed on June 27, 2005.

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<sup>1</sup> The "Amended Judgment" incorrectly reflected defendants Guidance Software, Inc. and Michael Gurzi's Counter-Motion for Summary Judgment as having been Granted in Part and Denied in Part.

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AS TO THE ISSUES THAT HAVE BEEN TRIED BEFORE THE COURT AND  
THE DECISION THAT HAS BEEN RENDERED BY THE JURY:

IT IS ORDERED AND ADJUDGED THAT JUDGMENT is entered in favor of  
the Plaintiff in the amount of \$57,534.00, and against the defendant(s) Fleming in  
the amount of \$57,530.00; Mark Dillon in the amount of \$2.00; and Teresa Noa in  
the amount of \$2.00, and furthermore, is entered as pursuant to the "SPECIAL  
VERDICT FORM" filed on March 7, 2006.

cc: All Counsel and/or Parties of Record

\_\_\_\_\_  
March 16, 2006  
Date

\_\_\_\_\_  
SUE BEITIA  
Clerk  
  
\_\_\_\_\_  
*Ana S. Chang*  
(By) Deputy Clerk

ORIGINAL

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii  
citizen,

Plaintiff,

vs.

FLEMING COMPANIES, INC.,  
an Oklahoma corporation; MARK  
DILLON, TERESA NOA,  
MELVIN PONCE, SONIA  
PURDY, JUSTIN FUKUMOTO,  
ALFREDDA WAIOLAMA, and  
JACQUELINE RIO, Hawaii  
citizens; et al.,

Defendants.

Civ. No. 03-00385 SOM/LEK

SPECIAL VERDICT FORM

UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII  
MAR 7 - 2006  
at 3 o'clock and 45 min P.M.  
SUE BEITIA, CLERK

SPECIAL VERDICT FORM

The jury must answer all of the questions unless otherwise indicated. To understand what issues are being submitted to you, you may wish to read over the entire Special Verdict Form before proceeding to answer it. Answer the questions in numerical order. Follow the directions carefully. Each answer requires the agreement of all jurors. If you do not

understand any question, or if you wish to communicate with the Court on any subject, you must do so in writing through the courtroom manager.

**I. Direct Infringement**

**Actual Damages Caused by Direct Infringement**

1. Has the plaintiff proven by a preponderance of the evidence that he is entitled to recover actual damages for any defendant's use of the plaintiff's software between April 1, 2003, and June 9, 2003?

Yes X

No       

If you answered "Yes" to Question No. 1, go on to Question No. 2. If you answered "No" to Question No. 1, skip Question Nos. 2 and 3 and proceed to Question No. 4.

2. If you answered "Yes" to Question No. 1, state the total amount of actual damages that the plaintiff is entitled to recover for direct infringement.

\$ 51,534

Go on to Question No. 3.

3. State the portion of the actual damage amount that each defendant's direct infringement caused. If one or more defendants were responsible for

the entire actual damage amount, you may so indicate by writing the word “all” in the space next to any such defendant’s name. If a defendant did not cause the entire actual damage award, you may fill in “0” or a dollar amount less than your response to Question No. 2 next to that defendant’s name. Remember that the total of what all defendants caused is stated in your response to Question No. 2.

Fleming	\$ <u>57530</u>
Mark Dillon	\$ <u>2</u>
Teresa Noa	\$ <u>2</u>
Melvin Ponce	\$ <u>ϕ</u>
Sonia Purdy	\$ <u>ϕ</u>
Justin Fukumoto	\$ <u>ϕ</u>
Alfreda Waiolama	\$ <u>ϕ</u>
Jacqueline Rio	\$ <u>ϕ</u>

Go on to Question No. 4.



**Fleming's Profits Resulting from Direct Infringement**

4. Has the plaintiff proven by a preponderance of the evidence that he is entitled to recover profits attributable to Fleming's use of the plaintiff's software between April 1, 2003, and June 9, 2003?

Yes   X  

No       

If you answered "Yes" to Question No. 4, go on to Question No. 5. If you answered "No" to Question No. 4, skip Question No. 5 and proceed to Question No. 6.

5. If you answered "Yes" to Question No. 4, state the amount of profit attributable to Fleming's direct infringement, but do not include in your calculation any matters that would duplicate damages, if any, already awarded in your response to Question No. 2.

\$       \$      

Go on to Question No. 6.

**II. Vicarious Liability**

6. Is Fleming vicariously liable for any employee defendant's use of the plaintiff's software between April 1, 2003, and June 9, 2003?

Yes   X  

No       

Please sign and date this form and give it to the courtroom manager.

7 MARCH 2006  
Date

L. Wayne Hu  
Foreperson